

1992

# Society of Separationists v. Ron Whitehead, Rom Godfrey, Nancy Pace, Alan Hardman, Roselyn Kirk, and Don Hale : Amicus Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Bruce Baird; Roger F. Cutler; Attorneys for Appellants.

Brian M. Banard; John Pace; Joro Walker-Pro Se; Attorneys for Appellees.

---

## Recommended Citation

Brief of Amicus Curiae, *Society of Separationists v. Ron Whitehead, Rom Godfrey, Nancy Pace, Alan Hardman, Roselyn Kirk, and Don Hale*, No. 920233.00 (Utah Supreme Court, 1992).

[https://digitalcommons.law.byu.edu/byu\\_sc1/4202](https://digitalcommons.law.byu.edu/byu_sc1/4202)

This Brief of Amicus Curiae is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

SOCIETY OF SEPARATIONISTS, :  
INC., a Maryland non-profit :  
corporation; RICHARD ANDREWS :  
and J. WALKER, :

Plaintiffs-Appellees, :

vs. :

RON WHITEHEAD, TOM GODFREY, :  
NANCY PACE, ALAN HARDMAN, :  
ROSELYN KIRK and DON HALE, :  
Members Salt Lake Council, :

Case No. 920233

Defendants-Appellants. :

---

BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION

---

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT  
COURT OF SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK,  
GRANTING THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT  
AND DENYING THE DEFENDANTS' CROSS-MOTION FOR SUMMARY  
JUDGMENT FINDING THE PRACTICE OF OPENING SALT LAKE CITY  
COUNCIL MEETINGS WITH PRAYER TO BE IN VIOLATION OF ARTICLE I,  
SECTION 4, OF THE UTAH CONSTITUTION AND PERMANENTLY ENJOINING  
FUTURE PRAYERS BY THE SALT LAKE CITY COUNCIL

ROGER F. CUTLER  
BRUCE R. BAIRD  
451 South State, #505  
Salt Lake City, Utah 84111

Attorneys for Appellants

PAUL D. LYMAN  
DAVID L. CHURCH  
250 N. Main Street  
Richfield, Utah 84701

Attorneys for Amicus Curiae  
Utah League of Cities and  
Towns, et al.

KATHRYN D. KENDELL  
#9 Exchange Place, #415  
Salt Lake City, Utah 841

Attorneys for Amicus Curiae  
American Civil Liberties  
Union of Utah Foundatio

BRIAN M. BARNARD  
JOHN PACE  
JORO WALKER-Pro Se  
214 East Fifth South  
Salt Lake City, Utah 841

Attorneys for Appellees

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

SOCIETY OF SEPARATIONISTS, :  
INC., a Maryland non-profit :  
corporation; RICHARD ANDREWS :  
and J. WALKER, :

Plaintiffs-Appellees, :

vs. :

RON WHITEHEAD, TOM GODFREY, :  
NANCY PACE, ALAN HARDMAN, :  
ROSELYN KIRK and DON HALE, :  
Members Salt Lake Council, :

Case No. 920233

Defendants-Appellants. :

---

BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION

---

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT  
COURT OF SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK,  
GRANTING THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT  
AND DENYING THE DEFENDANTS' CROSS-MOTION FOR SUMMARY  
JUDGMENT FINDING THE PRACTICE OF OPENING SALT LAKE CITY  
COUNCIL MEETINGS WITH PRAYER TO BE IN VIOLATION OF ARTICLE I,  
SECTION 4, OF THE UTAH CONSTITUTION AND PERMANENTLY ENJOINING  
FUTURE PRAYERS BY THE SALT LAKE CITY COUNCIL

ROGER F. CUTLER  
BRUCE R. BAIRD  
451 South State, #505  
Salt Lake City, Utah 84111

Attorneys for Appellants

PAUL D. LYMAN  
DAVID L. CHURCH  
250 N. Main Street  
Richfield, Utah 84701

Attorneys for Amicus Curiae  
Utah League of Cities and  
Towns, et al.

KATHRYN D. KENDELL  
#9 Exchange Place, #419  
Salt Lake City, Utah 84111

Attorneys for Amicus Curiae  
American Civil Liberties  
Union of Utah Foundation

BRIAN M. BARNARD  
JOHN PACE  
JORO WALKER-Pro Se  
214 East Fifth South  
Salt Lake City, Utah 84111

Attorneys for Appellees

## TABLE OF CONTENTS

	<u>PAGE NO.</u>
STATEMENT OF AUTHORITY . . . . .	1
STATEMENT OF ISSUES. . . . .	1
CONSTITUTIONAL AND STATUTORY PROVISIONS. . . . .	2
STATEMENT OF CASE. . . . .	2
STATEMENT OF FACTS . . . . .	3
SUMMARY OF ARGUMENTS . . . . .	3
ARGUMENT . . . . .	4
I.    THE CITY COUNCIL IS NOT A CO-EQUAL BRANCH OF GOVERNMENT AND ITS ACTIONS ARE NOT ACCORDED ANY SPECIAL DEFERENCE. . . . .	4
II.   IF THE LANGUAGE OF A CONSTITUTIONAL PROVISION IS CLEAR THERE IS NO RESORT TO EXTRANEIOUS EVIDENCE. . . . .	5
III.  THE LANGUAGE OF ARTICLE I, § 4 IS CLEAR AND UNAMBIGUOUS. . . . .	7
IV.   PRAYER IS A RELIGIOUS EXERCISE . . . . .	9
A. Appellant's Insistence That Prayer Is Secular Is Unpersuasive. . . . .	9
B. The Utah Constitution Prohibits The Application or Appropriation of Public Money To Support The City Council's Prayer Practice . . . . .	10
V.    THE GUARANTEE OF FREE EXERCISE IS BEST PROTECTED WHEN GOVERNMENT DISPLAYS FIDELITY TO ITS SECULAR PURPOSE AND FUNCTION . . . . .	14
VI.   GOVERNMENT SPONSORED PRAYER CREATES UNAVOIDABLE AND UNCONSTITUTIONAL DIVISIVENESS AND ISOLATION . . . . .	18

CONCLUSION . . . . .	20
APPENDIX A . . . . .	
APPENDIX B . . . . .	
APPENDIX C . . . . .	

## TABLE OF AUTHORITIES

### CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS

	<u>PAGE NO.</u>
Article I, Section 4, Constitution of Utah . . .	2, 7
Article V, Constitution of Utah. . . . .	4
Article I, Section 11, Constitution of Washington . . . . .	12
Utah Code (1992), Title 10 . . . . .	4
Utah Code (1992), Section 10-1-201 . . . . .	4

### CASE LAW

<i>Abington School District v. Schempp</i> , 374 U.S. 203, 305 (1963). . . . .	18
<i>Calvary Bible Presbyterian Church v. Board of Regents</i> , 72 Wash. 2d. 912, 436 P.2d. 189 (1967) . . . . .	13
<i>County of Allegheny v. ACLU</i> , 109 S. Ct. 3086, 3101 (1989). . . . .	19
<i>County of Apache v. Southwest Lumber Mills</i> , 376 P.2d 854 (Ariz. 1962). . . . .	7
<i>General Electric v. Thrifty</i> , 5 Utah 2d 326, 301 P.2d 741 (1956). . . . .	5
<i>Girouard v. United States</i> , 328 U.S. 61 (1946). .	16
<i>Graham v. Central Community School Dist.</i> , 608 F. Supp. 531 (S.D. Iowa 1986) . . . . .	10

<i>Gubler v. Utah State Teachers Retirement Board</i> , 113 Utah 188, 192 P.2d. 580 (1948) . .	11
<i>Hall v. Bradshaw</i> , 630 F.2d. 1018 (4th Cir. 1980) . . . . .	10
<i>Hines v. Winters</i> , 320 P.2d 1114 (Okla. 1957) . .	6
<i>In re: Initiative Petition No. 281, State Question No. 441 v. Rogers</i> , 434 P.2d 941 (Okla. 1967). . . . .	6
<i>Kay v. David Douglas School District</i> , 719 P.2d 875 (Or. App. 1985). . . . .	10
<i>Karen B. v. Trenn</i> , 653 F.2d 897 (5th Cir. 1981) aff'd mem., 455 U.S. 913 (1982). . . .	9, 10
<i>Lee v. Weisman</i> , No. 90-1014, 1992 WL 138525 (U.S. Sup. Ct. June 24, 1992). . . . .	10, 14, 17
<i>Lynch v. Donnelly</i> , 465 U.S. 668, 687 (1984). . .	19
<i>Manning v. Sevier County</i> , 30 Utah 2d. 305, 517 P.2d. 549 (1973) . . . . .	11
<i>Marsh v. Chambers</i> , 463 U.S. 783, 797 (1983). . .	9
<i>P.I.E. Emp. Fed. Credit Union v. Bass</i> , 759 P.2d 1114 (Utah 1988). . . . .	7
<i>Rampton v. Barlow</i> , 464 P.2d 378 (Utah 1970) . . .	6
<i>Shaw v. Grumbie</i> , 278 P.2d 311 (Okla. 1929) . . .	6
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963). . . . .	16
<i>State ex. rel. Dearle v. Frasier</i> , 102 Wash. 369, 173 P. 35 (1918). . . . .	12
<i>Texas Monthly, Inc. v. Bullock</i> , 109 S. Ct. 890, 896 (1989) . . . . .	20
<i>Thomas v. Daughters of Utah Pioneers</i> , 114 Utah 108, 197 P.2d. 477 (1948). . . . .	11
<i>Torasco v. Watkins</i> , 367 U.S. 488, 495 (1961) . .	20
<i>University of Utah v. Board of Examiners</i> , 4 Utah 2d. 408, 295 P.2d 348 (1956). .	6
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985) . . . . .	19

<i>Webster v. Reproductive Health Services</i> , 109 S.Ct. 3040-3050 (1989) . . . . .	8
<i>West Virginia State Board of Education v.</i> <i>Barnett</i> , 319 U.S. 624 (1943) . . . . .	16
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972). . . . .	16
<i>Witters v. State of Washington Commission for</i> <i>the Blind</i> , 771 P.2d. 1119 (Wash. 1989) . . . . .	13

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

SOCIETY OF SEPARATIONISTS, :  
INC., a Maryland non-profit :  
corporation; RICHARD ANDREWS :  
and J. WALKER, :

Plaintiffs-Appellees, :

vs. :

RON WHITEHEAD, TOM GODFREY, :  
NANCY PACE, ALAN HARDMAN, :  
ROSELYN KIRK and DON HALE, :  
Members Salt Lake Council, :

Case No. 920233

Defendants-Appellants. :

---

BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC.

---

STATEMENT OF AUTHORITY

This brief of the *Amicus Curiae*, American Civil Liberties Union of Utah Foundation, Inc., is filed pursuant to Rule 25, Utah Rules of Appellate Procedure, by leave of the Court and by consent of all parties.

STATEMENT OF THE ISSUES DISCUSSED  
BY AMICUS CURIAE

*Amicus Curiae* will focus on whether the judgment by the Third Judicial District Court granting the plaintiff's Motion for Summary Judgment and denying the defendant's Motion for Summary Judgment was proper in light of Article I, § 4 of the Utah Constitution, which prohibits the application or appropriation of public money for any religious exercise or worship.



## CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 4, Constitution of Utah states in full as follows:

The rights of conscience shall never be infringed. The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of church and state, nor shall any church dominate the state or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. Property qualifications shall not be required of any person to vote, or hold office, except as provided in this constitution.

## STATEMENT OF THE CASE

On September 26, 1991, the Society of Separationists, Richard Andrews and J. Walker ("Appellees"), filed an action against the Salt Lake City Council ("Appellants" or the "Council"), seeking to enjoin Appellants from the practice of opening their city council meetings with public prayer. Appellees argued that public prayer at City Council meetings was violative of Article I, § 4 of the Utah Constitution, which prohibits expenditure of any public money for, or application of public property to, any religious exercise or worship. It is not disputed by the parties that public money and property is appropriated and applied to the City Council's practice of prayer. The parties filed cross-motions for summary judgment. The Third Judicial District Court granted summary judgment in

favor of Appellees, finding that Appellants' practice of prayer at city council meetings was unconstitutional in violation of Article I, § 4 of the Utah Constitution.

A Notice of Appeal was filed on May 1, 1992.

#### STATEMENT OF FACTS

*Amicus Curiae*, American Civil Liberties Union of Utah Foundation, Inc., adopts the facts as set forth in appellees' brief filed with this Court.

#### SUMMARY OF ARGUMENTS

I. The Salt Lake City Council is not the State Legislature. A city council is not a branch of government co-equal with the Legislature. All actions of a City County are subject to review for constitutionality and no special deference is accorded to this subservient government entity.

II. The intent of a constitutional provision is determined by looking to the language of the provision. If the language is clear and unambiguous, resort to extrinsic evidence is not appropriate.

III. The language of Article I, § 4 of the Utah Constitution is clear, unambiguous and capable of "ready interpretation".

IV. Prayer is an inherently religious exercise and by its very nature and purpose is not secular activity. The Utah Constitution prohibits public money or support for the religious exercise of prayer.

V. In order to best assure that citizens are guaranteed religious liberty and free exercise, the government must not

sponsor nor engage in religious exercise. Where, as here, the State endorses religion, supports the prayer exercise, and sets policy as to prayer content, free exercise is threatened.

VI. Government sponsorship of religion creates unavoidable and unconstitutional divisiveness. When the government takes a position supporting religious belief non-adherents are made to feel as outsiders, disenfranchised and isolated.

#### ARGUMENT

I. THE CITY COUNCIL IS NOT A CO-EQUAL BRANCH OF GOVERNMENT AND ITS ACTIONS ARE NOT ACCORDED ANY SPECIAL DEFERENCE.

Appellant's treat the City Council as a co-equal branch of government.<sup>1</sup> This line of analysis is patently absurd. Article V of the Utah Constitution creates three separate, co-equal branches of government, City Council's are not part of this tripartite. Moreover, Title 10 of the Utah Code makes clear that municipalities are legislatively created political subdivisions.<sup>2</sup> The fact that a City Council may exercise some legislative functions does not *ipso facto* elevate it's status beyond what is plainly is, a political entity inferior to the judiciary and certainly accountable to this Court. The facially unconstitutional resolution at issue before this Court regarding the internal opening ceremony of the City Council is not entitled

---

<sup>1</sup> Appellant's boldly invoke *Marbury v. Madison*, for the proposition that the acts of a City Council are beyond the reach of this Court.

<sup>2</sup> Section 10-1-201 of the Utah Code specifically creates municipalities and specifies their status as political subdivisions of the State of Utah. Utah Code § 10-1-201 (1992).

to any deference.

II. IF THE LANGUAGE OF A CONSTITUTIONAL PROVISION  
IS CLEAR THERE IS NO RESORT TO EXTRANEOUS  
EVIDENCE.

Appellants correctly assert that the first rule of constitutional construction is to ascertain the intent of those who framed the constitutional provision. Appellants rely on numerous cases for this "first rule of constitutional construction." (Brief of Appellants', p. 15 & 21). However, Appellants misstate the first principle of this rule, that intent is first ascertained from the language of the constitutional provision. If the language is clear the inquiry ends. A close reading of the cases relied on by Appellants reveals that any resort to extraneous evidence of intent is appropriate only if the language of the provision is ambiguous. Appellants do not acknowledge this well-settled maxim; rather, they insist that looking at the clear language of the provision is but one "tool" of many to be used in interpreting the constitutional provision. This is not the law. Extraneous evidence is only resorted to if intent cannot be readily ascertained from the language used. In the cases relied on by appellants this principle is applied correctly and the proper analysis employed. However, Appellants ignore this analysis, instead quoting selectively from their authority.

For example, the City Council cites *General Electric v. Thrifty*, 5 Utah 2d. 326, 301 P.2d. 741 (1956), for the proposition that "the construction of the simple wording of a

Constitutional provision is subservient to [the framers'] intent. . . . " (Brief of Appellant's p. 21). In fact, the Court in its ultimate holding rejected this argument and instead held that intent is to be determined first from the language and there is no reason "to ignore or vary from the plain import of the words of the Constitution, even though events may have occurred which probably not foreseen at the time the provision was adopted." *Id.* at 752.

In *University of Utah v. Board of Examiners*, 4 Utah 2d. 408, 295 P. 2d 348 (1956), the Court stated that if there is no ambiguity or uncertainty and if the provisions are crystal clear then "extraneous or contemporaneous construction may not be resorted to." *Id.* at 361.

In *In re: Initiative Petition No. 281, State Question No. 441 v. Rogers*, 434 P.2d 941 (Okla. 1967), the Oklahoma Supreme Court noted that "[i]ntent is to be found from the instrument itself. . . . When the text is not ambiguous, the court is not at liberty to search for meaning beyond the instrument." *Id.* at 943, (quoting *Hines v. Winters*, 320 P.2d 1114 (Okla. 1957); see also, *Shaw v. Grumbie*, 278 P.2d 311 (Okla. 1929) ("To reach meaning the first resort in all cases is to the natural significance of the words.") Thus, the first step in constitutional or statutory interpretation is to give the words their "natural, obvious and ordinary meaning." *County of Apache v. Southwest Lumber Mills*, 376 P.2d 854 (Ariz. 1962).

In *P.I.E. Emp. Fed. Credit Union v. Bass*, 759 P.2d 1144

(Utah 1988), relied on by *amicus curiae* League of Cities and Towns, this Court held as follows:

When the language of a particular provision of a statute is ambiguous, the Court may attempt, following principles of statutory construction, to ascertain the intention of the Legislature; *but where there is no ambiguity the plain language of the statute must be taken as the expression of the [framer's] intent.*

*Id.* at 1151, emphasis added.

Appellants also misconstrue the essential holding of *Rampton v. Barlow*, 464 P.2d 378 (Utah 1970). *Rampton* stands for the proposition that where the language is clear, practical considerations, even those of long standing, cannot be controlling. *Id.* at 382.

Appellants repeatedly deride and ridicule the District Court for its reliance on the plain meaning of Article I, § 4. Yet the District Court was entirely correct in refusing to look past the unambiguous language of Article I, § 4. Appellants invitation to this Court to second guess the intent of the framer's as embodied in the language of Article I, § 4 should be declined.

### III. THE LANGUAGE OF ARTICLE I, § 4 IS CLEAR AND UNAMBIGUOUS.

Article I, § 4 of the Utah Constitution states in pertinent part as follows:

The rights of conscience shall never be infringed. The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof:  
. . . There shall be no union of church and state, nor shall any church dominate the State or interfere with its functions.

*No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. . . .*[emphasis added]<sup>3</sup>

The District Court found this language "unambiguous and capable of ready interpretation." (Memorandum Decision, p. 12 attached as Appendix B). According to the District Court, the language of Article I, § 4 is an "unequivocal, unconditional pronouncement", which leaves "little room for clarification and interpretation." *Id.*

Appellants attempt to manufacture an ambiguity by comparing the Article I, § 4 with the Utah Constitution Preamble. The Preamble begins, "Grateful to Almighty God". . . . Appellants argue that this simple declaration is inconsistent with the plain language of Article I, § 4. This position mocks the Framers. First, until this Court definitively states otherwise, the Preamble is not construed as law and is of no practical effect.<sup>4</sup> Second, the Preamble is not religious exercise, worship or instruction, and therefore no inconsistency exists. A mere reference to a Deity is not reasonably characterized as prayer. Appellants consistently fail to acknowledge the distinction between the clearly religious exercise of prayer and the non-

---

<sup>3</sup> This provision is not unique. Some 45 states have constitutional provisions, which expand on the cryptic language of the First Amendment. Many of these provisions also prohibit the expenditure of public funds for any religious worship or exercise. See Appendix A.

<sup>4</sup> See e.g., *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3050 (1989).

religious exercises of singing patriotic songs, reciting of the Pledge of Allegiance, or imprinting currency with the words "In God We Trust". This Court should not countenance Appellants' attempts to create false issues of constitutional conflict and ambiguity.

#### IV. PRAYER IS A RELIGIOUS EXERCISE.

##### A. Appellants' Insistence That Prayer Is Secular Is Unpersuasive.

Prayer is, by any objective standard, a religious exercise. The definitive purpose of prayer is to invoke divine guidance or to address God, *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). The Council's prayer "guidelines" assert that their prayers have only a secular purpose. Such self-serving assertions belie the teaching and experience of thoughtful citizens.

Prayer is perhaps the quintessential religious practice for many of the world's faiths and plays a significant role in the devotional lives of most religious people . . . . Prayer is an address of entreaty, supplication, praise or thanksgiving directed to some sacred or divine spirit, being or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise.

*Karen B. v. Trenn*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982).<sup>5</sup>

---

<sup>5</sup> See also, *Hall v. Bradshaw*, 630 F.2d 1018, 1020 (4th Cir. 1980), ("A prayer . . . is undeniably religious and has, by its nature both a religious purpose and effect"); *Graham v. Central Community School Dist.*, 608 F. Supp. 531, 535 (S.D. Iowa 1986), (It is "the undeniable truth that prayer is inherently religious"); *Kay v. David Douglas School District*, 719 P.2d 875,



Even granting that a secular purpose is present, for example, "to provide a moment during which the Council Members and the audience can reflect on the importance of the business before the Council" . . . (Attachment "1", Brief of Appellants), the Council still cannot use religious means to achieve secular ends. "The unmistakable message of the Supreme Court's teachings is that the State cannot employ a religious means to serve an otherwise legitimate secular interest." *Karen B.*, 653 F.2d at 901.

B. The Utah Constitution Prohibits the Application Or Appropriation of Public Money to Support The Council's Sponsoring of Prayer.

It is conceded by Appellants that public money is appropriated and applied to the support of prayer at city council meetings. Because prayer is a religious exercise, the City Council practice violates the clear prohibition stated in Article I, § 4.

This Court has interpreted Article I, § 4. In each case, this Court found the challenged action could not properly be categorized as religious exercise, worship or instruction.<sup>6</sup>

---

879-80 (Or. App. 1985), ("It would be a contradiction in terms to say that the giving of a prayer has no religious purpose"); *Lee v. Weisman*, No. 90-1014, slip op. (U.S. Sup. Ct. June 24, 1992), (prayer treated as a religious exercise).

<sup>6</sup> In *Gubler v. Utah State Teachers Retirement Board*, 113 Utah 188, 192 P.2d 580 (1948), the Utah Supreme Court held that a state law which permitted public school teachers to receive retirement credit in the state retirement system for years which they had spent teaching in parochial schools was not prohibited by Article I, § 4. The Court specifically found that "no public money or

Article I, § 4 prohibits the application or appropriation of public money to "religious worship, exercise or instruction." Thus, if and only if a challenged action is religious worship, exercise or instruction is it violative of the Utah Constitution.<sup>7</sup>

It has been noted that the Utah provision is virtually identical to a provision of the Washington Constitution. While the Washington Supreme Court has not had occasion to address the constitutionality of city council prayer, that Court has previously interpreted its constitutional counterpart to Utah's

---

property has been appropriated or is being applied to any religious worship, exercise, or instruction." *Id.* at 587.

In *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P.2d 477 (1948), the Court held that the construction of the Daughters of Utah Pioneers museum with state funds did not violate Article I, § 4. Again, the Court asked whether the construction of the museum would amount to religious exercise, worship or instruction. The Court found no evidence of any such action and determined that before it could find a violation of the Utah Constitution, it would need to find "proof of overt acts of proselytizing." *Id.* at 489.

Finally, in *Manning v. Sevier County*, 30 Utah 2d 305, 517 P.2d 549 (1973), the Court upheld the use of public funds to construct a hospital which was to be leased and operated by a church-held corporation. Once again, the Court held there was no violation of Article I, § 4 because there would be no religious rooms, no religious symbols, no reference to any religious denomination, no proselytizing, nor any other activities that could be characterized as religious exercise, worship or instruction.

<sup>7</sup> Appellants conjecture here, as they did below, a number of scenarios to incite conflict and hysteria. Appellants fail to acknowledge the limiting language of Article I, § 4. A challenged practice will be vulnerable to attack only if public money or property is appropriated or applied and the action is legitimately characterized as religious worship, exercise or instruction. Moreover, both the First Amendment and Article I, § 4 protect private citizens in the Free Exercise of their religious beliefs. (See *infra* Section IV). Non-government supported religious exercise is not at issue here.

Article I, § 4.<sup>8</sup>

In each instance, the Washington Supreme Court engaged in the very analysis as our District Court below. The Court looked first to whether public money was spent and second to whether the challenged practice was religious exercise, worship or instruction.

In *State ex. rel. Dearle v. Frasier*, 102 Wash. 369, 173 P. 35 (1918), the Washington Court struck down a school board resolution giving high school credits for Bible study done outside of school. The Court reached this decision based on its view that the Bible study was religious instruction for which public money was allocated or appropriated and therefore prohibited by the Washington Constitution.

In *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d. 912, 436 P.2d. 189 (1967), cert. denied 393 U.S. 96,

---

<sup>8</sup> Washington Constitution Article I, § 11 states:

"Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: Provided, however, that this article shall be not so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of this opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony."

(1968), the Washington Court found that an elective university course, "English 390: The Bible as Literature", did not violate the Washington Constitutional provision. The court in *Calvary* found that the testimony and evidence demonstrated that the course did not amount to religious instruction.

"We find that English 390 was taught in a completely objective manner; had no effect on religious beliefs; was not slanted toward any particular theological or religious point of view; did not indoctrinate anyone; did not enter into the realm of belief or faith; and was not taught from a religious point of view."

*Id.* at 194. In *Witters v. State of Washington Commission for the Blind*, 771 P.2d. 1119 (Wash. 1989), the court held that the appropriation or allocation of rehabilitation funds to finance the education of a blind student at a religious institution designed to prepare him for a career as a pastor was a violation of the Washington State Constitution. The court found that the student sought funds for what was undeniably religious instruction.<sup>9</sup>

In each of the Utah and Washington cases, the Court found a violation of the relevant constitutional provisions if the activity engaged in by the State in supported of religion generally or supported religious beliefs as against disbelief. If the effect, or purpose, or intent of the State's activity is

---

<sup>9</sup> In none of the cases interpreting Article I, § 4 or the Washington provision did the Court look behind the language of their respective provisions. Obviously the Court viewed the language as self-evident of the Framers intent.

to promote or favor religion, there is a violation of the constitutional provision.

V. THE GUARANTEE OF FREE EXERCISE IS BEST  
PROTECTED WHEN GOVERNMENT DISPLAYS  
FIDELITY TO ITS SECULAR PURPOSE AND  
FUNCTION.

The First Amendment to the U.S. Constitution provides for two distinct religious guarantees, freedom to engage in the free exercise of religion and freedom from government establishment of religion.<sup>10</sup>

These "clauses exist to protect religion from government interference." *Lee v. Weisman*, No. 90-1014, slip op. at 10 (U.S. Sup. Ct. June 24, 1992). According to *Lee* "the First Amendment's religion clauses, mean that religious beliefs are too precious to be either proscribed or prescribed by the State." *Id.* In *Lee*, the challenged practice was school graduation prayer. In holding that such prayers violated the First Amendment, the Court undertook a thoughtful analysis of the religion clauses which applies equally here.

It appears lost on Appellants that the precious freedom to engage in religious exercise is threatened when government assumes a central role in that exercise. "A State created orthodox, puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is

---

<sup>10</sup> Of course the language of the First Amendment is codified in Article I, § 4, thus U.S. Supreme Court interpretation of the First Amendment guarantees is instructive.

real, not imposed." *Id.* at 12.

According to *Lee*:

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as it's own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression, the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.

*Id.* Citations omitted.

Few scenarios of state-sponsored religious exercise could be more violative of the principles espoused above than the City Council prayer at issue here.

One timeless lesson is that if citizens are subjected to State-sponsored religious exercises, the State disavows it's own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of free people. To compromise that principle today, would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves. *Id.* at 12-13.

The record here reveals not only State support for and sponsorship of prayer, but attempts by the State to proscribe the content of the prayers through official policy. (Brief of Appellant's, Attachment 1).

The City Council has argued that their prayer policy is intended to include "all points of view", "a wide variety of prayers" and "diversity." (Brief of Appellant's p. 7, ¶10). This goal only furthers state involvement with impermissible religious activity: "Nor does it solve the problem to say that the State should promote a 'diversity' of religious views; that position would necessarily compel the government and, inevitably, the Courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each." *Id.* at 9 (Souter, JJ., concurring).

In short, the government must remain neutral in matters of religion. The province of government is to govern. Fortunately, government also has the right and duty to protect the free exercise of its citizens. That is the promise of the Free Exercise Clause. The State can and should accommodate the free exercise of religion "by relieving people from generally applicable rules that interfere with their religious callings."<sup>11</sup> *Id.* at 19 (Souter, JJ., concurring).

---

<sup>11</sup> See e.g. *Sherbert v. Verner*, 374 U.S. 398 (1963) (Where Court held that a state's denial of unemployment insurance benefits to Appellant based on her refusal to work on Saturday due to her religious beliefs was "unconstitutional denial of Appellants free exercise"); *West Virginia State Board of Education v. Barnett*, 319 U.S. 624 (1943) (Where Court held that a Board of Education Resolution ordering the Pledge of Allegiance become a regular part of the program of activities) in the public schools was an unconstitutional infringement on free exercise of Jehovah's Witnesses); *Girouard v. United States*, 328 U.S. 61 (1946) (Where Court held that religious pacifists were eligible for citizenship in the United States and would not be required to take the usual oath to bear arms); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Where

Accommodation is not unlimited. The appropriate scope is defined by the requirement that any accommodation must "lift a discernible burden on the free exercise of religion." *Lee v. Weisman*, at 21 (Souter JJ., concurring). "Concern for the position of religious individuals in the modern regulatory State, cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief." *Id.* Justice Souter then counters an argument apparently made with a straight face by Appellants: that omitting prayers would violate the free speech rights of City Council Members. (Brief of Appellant's p. 17). To paraphrase Justice Souter: "[religious City Council members] cannot complain that omitting prayers from their [City Council meeting] would, in any realistic sense, "burden" their spiritual callings. To be sure, many of them invest the [meeting] with spiritual significance, but they may express their religious feelings about it before and after the [meeting]. They may even organize a privately sponsored [prayer] if they desire the company of like minded [City Council members]. *Id.* at 21-22. Essentially, what Appellants seek is protection for impermissible religious exercise which otherwise is wholly available to them without government interference or proscription. This is not merely accommodation but sponsorship. "Because they accordingly have no need for the machinery of the State to affirm their

---

Court held that the state could not compel attendance at public secondary schools of Amish children).



beliefs, the government sponsorship of prayer . . is most reasonably understood as an official endorsement of religion and, in this instance, of theistic religion." *Id.* The significant distinction between endorsement and accommodation must be honored by the City Council. The City Council has an obligation to uphold the guarantee of religious liberty which requires the Council not to intrude into matters of religion.

The distinct guarantees embodied in the First Amendment and in Article I, § 4 will, "through vigorous enforcement 'promote and assure the fullest possible scope of religious liberty and tolerance for all and . . . nurture the conditions which secure the best hope of attainment of that end.'" *Id.* at 7 (Blackmun, J., concurring) quoting *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

#### VI. GOVERNMENT SPONSORED PRAYER CREATES UNAVOIDABLE AND UNCONSTITUTIONAL DIVISIVENESS AND ISOLATION.

City Council prayer has generated much public discussion.<sup>12</sup> "Numerous letters to the Editor and Editorials have appeared in newspapers throughout the State. The Utah State Legislature has created the Religious Liberty Committee whose express purpose is to consider the amending of Article I, § 4 and possibly delete the religious liberty protections contained therein. Eminent Constitutional scholars warn of the

---

<sup>12</sup> *Amici* respectfully suggests that the Court can take judicial notice of this fact.

divisiveness generated by this issue.<sup>13</sup>

The U.S. Supreme Court has often recognized the sensitive and divisive nature of government involvement in religion. The Court has repeatedly noted that the First Amendment "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3101 (1989), quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

When the very governmental body from which a citizen seeks advice or redress sponsors religious activity contrary to his or her beliefs, the government diminishes that citizen's status. As Justice O'Connor notes, "[e]ndorsement sends a message to non-adherents that they are not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688. See also *Wallace v. Jaffree*, 472 U.S. 38 (1985) ("the political interest in forestalling intolerance extends beyond intolerance among Christian sects--or even intolerance among 'religions'--to encompass intolerance of the disbeliever and the uncertain"); *Torasco v. Watkins*, 367 U.S. 488, 495 (1961) (the state may not pass laws that "aid all religions against non-believers"); *Texas Monthly, Inc. v. Bullock*, 109 S.

---

<sup>13</sup> Alfred C. Emery and John J. Flynn, Rush To Amend Utah Constitution Invites Divisive Religious Assault, Salt Lake Tribune, May 11, 1991 at A9, attached as Appendix C.

Ct. 890,896 (1989) ("the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally.")

The above analysis is apt in this context. A City Council meeting is a intimate forum. Citizens address directly their elected representatives, air grievances or request consideration or redress. There is an immediacy absent from other legislative settings.<sup>14</sup> The Court's instructions are clear: government action which has the effect of penalizing or favoring religious belief is unconstitutional. That is the effect of City Council prayer. This effect coupled with the expansive prohibitory language of Article I, § 4 demonstrate the rightness of the District Court's ruling.

#### CONCLUSION

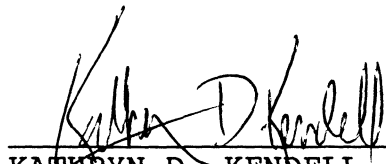
The language of Article I, § 4 of the Utah Constitution is straightforward. In the face of clear constitutional language, this Court is not at liberty to surmise an intent contrary to that language. The sole issue before this Court is the constitutionality under Article I, § 4 of City Council prayer exercises. Historically, government involvement or sponsorship of religious activity has engendered divisiveness and intolerance of those who object. This case aptly demonstrates that reality.

---

<sup>14</sup> While the issue is not directly before this Court *Amici* notes that City Council prayer is not akin to the opening prayers of state legislatures found constitutional under *Marsh v. Chambers*, 463 U.S. 783 (1983). This position is supported by the U.S. Supreme Court's decision *Lee v. Weisman*, No. 90-1014, slip op. (U.S. Sup. Ct. June 24, 1992). In *Lee* the Court explicitly restricted *Marsh* to "state legislative bodies." *Id.* at 17.

The religious liberty of the citizens of Utah is best protected when government strictly maintains its secular function. Each citizen is entitled to full and free exercise of his or her religious beliefs without government approval or disdain. The decision of the Third Judicial District Court was correct, in accordance with settled principles of constitutional construction, and serves the best interests of all citizens. The decision of the District Court should be affirmed.

Dated this 22<sup>nd</sup> day of October, 1992.

  
KATHRYN D. KENDELL  
AMERICAN CIVIL LIBERTIES UNION OF  
UTAH FOUNDATION, INC.

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the above and foregoing BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC., were placed in the United States mail at Salt Lake City, Utah, with first-class postage thereon fully prepaid on the 23<sup>rd</sup> day of October, 1992, addressed as follows:

Mr. Brian Barnard  
Attorney at Law  
214 East Fifth South  
Salt Lake City, Utah 84111

Mr. Roger Cutler  
Attorney at Law  
451 South State Street, #505  
Salt Lake City, Utah 84111

Mr. Paul Lyman  
250 North Main Street  
Richfield, Utah 84701

Cheryl D. Asmus

Tab A

## APPENDIX A - TABLE OF CONTENTS

1. ALA. CONST. Art. I, § 3
2. ARIZ. CONST. Art. II, § 12, Art. IX, § 10
3. ARK. CONST. Art. II, §§ 24-26
4. CAL. CONST. Art. I, § 4
5. COLO. CONST. Art. II, § 4
6. CONN. CONST. Art. VII, § 8
7. DEL. CONST. Art. I, § 1
8. FLA. CONST. Art. I, § 3
9. GA. CONST. Art. I, § 2
10. HAW. CONST. Art. I, § 4
11. IDAHO CONST. Art. IX, § 5
12. ILL. CONST. Art. I, § 3
13. IND. CONST. Art. I, §§ 2-7
14. IOWA CONST. Art. I, § 4
15. KAN. CONST. Art. § 7
16. KY. CONST. § 5
17. ME. CONST. Art. I, § 3
18. MD. CONST Art. 36-37
19. MASS. CONST. Art. 46, § 2
20. MICH. CONST. Art. I, § 4
21. MINN. CONST. Art. I, §§ 16-17
22. MISS. CONST. Art, IV, § 18
23. MO. CONST. Art. I, §§ 5-7
24. NEB. CONST. Art. I, § 4
25. NEV. CONST. Art. I, § 4
26. N.H. CONST. § 5
27. N.J. CONST. Art. I, §§ 3-5
28. N.M. CONST. Art. II, § 11
29. N.Y. CONST. Art. I, § 3
30. N.C. CONST. Art. I, § 19
31. N.D. CONST. Art. I, § 3
32. OHIO CONST. Art., I, § 7
33. OKLA. CONST. Art. II, §§ 2 & 5
34. OR. CONST. Art. I, §§ 2-6
35. PA. CONST. Art. I, §§ 3-4
36. S.C. CONST. Art. I, § 2
37. S.D. CONST. Art VI, § 3
38. TENN. CONST. Art. I, §§ 3-4
39. TEX. CONST. Art. I, §§ 4-7
40. VT. CONST. Art. III, chpt. 3
41. VA. CONST. Art. I, § 16
42. WASH. CONST. Art. I, § 11
43. W. VA. CONST. Art. III, § 15
44. WIS. CONST. Art. I, §§ 18-19
45. WYO. CONST. Art. I, §§ 18-19

## APPENDIX A

Relevant portions of other State Constitutions:

The portion of each state constitution that parallels Article I, § 4 of the Utah Constitution provides:

1. "That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode or worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles." ALA. CONST. Art. I, § 3.

2. "The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any



court of justice to affect the weight of his testimony." ARIZ. CONST. Art. II, § 12, Art. IX, § 10.

3. "Religious liberty.--All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect or support any place of worship; or to maintain any ministry against his consent. No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship above any other.

Protection of religion.--Religion, morality and knowledge being essential to good government, the General Assembly shall enact suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship.

Religious test.--No religious test shall ever be required of any person as a qualification to vote or hold office, nor shall any person be rendered incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths or affirmations." ARK. CONST. Art. II, §§ 24-26.

4. "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of

religion.

A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs. (New section adopted November 5, 1974.)" CAL. CONST. Art. I, § 4.

5. "Religious freedom. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship." COLO. CONST. Art. II, § 4.

6. "The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state." CONN. CONST. Art. VII, § 8.

7. "Although it is the duty of all men frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities

depends, are hereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship." DEL. CONST. Art. I, § 1.

8. "Religious freedom.-There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect. or religious denomination or in aid of any sectarian institution." FLA. CONST. Art. I, § 3.

9. "Freedom of conscience. Each person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience, and no human authority should, in any case, control or interfere with such right of conscience.

Religious opinions; freedom of religion. No inhabitant of his state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of freedom of religion shall

not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state." GA. CONST. Art. I, § 2.

10. "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances." HAW. CONST. Art. I, § 4.

11. "Guaranty of religious liberty. The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes." IDAHO CONST. Art. IX, § 5.

12. "The free exercise and enjoyment of religious profession and worship without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." ILL. CONST. Art. I, § 3.

13. "Right to worship.-All people shall be secured in their natural right to worship Almighty God, according to the dictates of their own consciences. [As amended November 7, 1984.]

Freedom of thought.-No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.

No preference to any creed.-No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent. [As amended November 7, 1984.]

No religious test for office.-No religious test shall be required as a qualification for any office of trust or profit.

No money for religious institutions.-No money shall be drawn from the treasury, for the benefit of any religious or

theological institution.

Competency of witness.-No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion." IND. CONST. Art. I, §§ 2-7.

14. "No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law." IOWA CONST. Art. I, § 4.

15. "Religious liberty. The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief." KAN. CONST. Art. § 7.

16. "Right of religious freedom. No preference shall ever

be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anyway diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience." KY. CONST. § 5.

17. "Religious freedom: sects equal; religious tests prohibited; religious teachers. All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that a person does not disturb the public peace, nor obstruct others in their religious worship;-and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be

established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporated or unincorporated, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance." ME. CONST. Art. I, § 3.

18. "That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

Nothing shall prohibit or require the making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding,



activity, ceremony, school, institution, or place.

Nothing in this article shall constitute an establishment of religion, (1970, ch. 558, ratified Nov. 3, 1970.).

That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution." MD. CONST, Art. 36-37.

19. "It is the right as well as the Duty of all men in society, publicly, and as stated seasons to worship the Supreme Being, the great Creator and preserver of the Universe. An no Subject shall be hurt, molested, or restrained, in his person, Liberty, or Estate, for worshipping GOD in the manner and season most agreeable to the Dictates of his own conscience, or for his religious profession or sentiments; provided he doth not Disturb the public peace, or obstruct others in their religious Worship." MASS. CONST. Art. 46, § 2.

20. "Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any

such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." MICH. CONST. Art. I, § 4.

21. "Freedom of conscience; no preference to be given to any religious establishment or mode of worship. The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship or to maintain any religious or ecclesiastical ministry against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Religious tests and property qualifications prohibited. No religious test or amount of property shall be required as a qualification for any office of public trust in the state. No religious test or amount of property shall be required as a qualification of any voter at any election in this state; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the

subject of religion." MINN. CONST. Art. I, §§ 16-17.

22. "No religious test as a qualification for office shall be required; and no preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred. The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state, or to exclude the Holy Bible from use in any public school of this state." MISS. CONST. Art. IV, § 18.

23. "Religious freedom-liberty of conscience and belief-limitations.-That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

Practice and support of religion not compulsory-contracts therefor enforceable.-That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect,

church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.

Public aid for religious purposes-preferences and discriminations on religious grounds.-That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." MO. CONST. Art. I, §§ 5-7.

24. "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious beliefs; but nothing herein shall be constructed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

NEB. CONST. Art. I, § 4.

25. "Liberty of conscience. The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief, but the liberty of consciene [conscience] hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State." NEV. CONST. Art. I, § 4.

26. "[Religious Freedom Recognized.] Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship." N.H. CONST. § 5.

27. "No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretence whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the

maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

There shall be no establishment for one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin." N.J. CONST. Art., I, §§ 3-5.

28. "Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship." N.M. CONST. Art. II, § 11.

29. "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of

licentiousness, or justify practices inconsistent with the peace or safety of this state." N.Y. CONST. Art. I, § 3.

30. "Religious liberty. All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. CONST. Art. I, § 19.

31. "The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." N.D. CONST. Art. I, § 3.

32. "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being

essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." OHIO CONST. Art. I, § 7.

33. "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited.

No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." OKLA. CONST. Art. II, §§ 2 & 5.

34. "Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religious (sic) opinions, or interfere with the rights of conscience.

No religious qualification for office. No religious test shall be required as a qualification for any office of trust or profit.



No money to be appropriated for religion. No money shall be drawn from the Treasury for the benefit of any religious (sic), or theological institution, nor shall any money be appropriated for the payment of any religious (sic) services in either house of the Legislative Assembly.

No religious test for witnesses or jurors. No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religion (sic); nor be questioned in any Court of Justice touching his religious (sic) belief to affect the weight of his testimony." OR. CONST. Art. I §§ 2-6.

35. "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." PA. CONST. Art. I, §§ 3-4.

36. "Religious freedom; freedom of speech; right of assembly and petition.--The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise

thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances." S.C. CONST. Art. I, § 2.

37. "The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the state.

No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution." S.D. CONST. Art. VI, § 3.

38. "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law to any religious establishment or mode or worship.

That no political or religious test, other than an oath to

support the Constitution of the United States and of this State, shall ever be required as a qualification to any office or public trust under this State." TENN. CONST. Art. I, §§ 3-4.

39. "No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.

No person shall be disqualified to give evidence in any of the Courts of this State on account his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

No money shall be appropriated, or drawn from the Treasury

for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." TEX. CONST. Art. I, §§ 4-7.

40. "That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God: and that no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God." VT. CONST. Art. III, Chpt. 3.

41. "That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards

each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, and shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please." VA. CONST. Art. I, § 16.

42. "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment:

Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony." WASH. CONST. Art. I, § 11.

43. "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess and, by argument, to maintain their opinions in matters of religion; and the same shall, in nowise, affect, diminish or enlarge their civil capacities; and the Legislature shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support such private contracts as he shall

please.

Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation or prayer. No student of a public school may be denied the right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as part of the school curriculum." W.VA. CONST. Art. III, § 15.

44. "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

No religious tests shall ever be required as a qualification for any office of public trust under the state, and no person shall be rendered incompetent to give evidence in any court of law or equity in consequence of his opinions on the subject of religion." WIS. CONST. Art. I, §§ 18-19.

45. "The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered

incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatsoever; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

Appropriations for sectarian or religious societies or institutions prohibited.-No money of the state shall ever be given or appropriated to any sectarian or religious society or instruction." WYO. CONST. Art. I, §§ 18-19.



Tab B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

SOCIETY OF SEPARATIONISTS,	:	MEMORANDUM DECISION
INC., a Maryland non-profit	:	
corporation; RICHARD ANDREWS;	:	CIVIL NO. 910906136
and J. WALKER,	:	
Plaintiffs,	:	
vs.	:	
RON WHITEHEAD, WAYNE HORROCKS,	:	
NANCY PACE, ALAN HARDMAN, TOM	:	
GODFREY, ROSELYN KIRK and	:	
TOM HALE, Members Salt Lake	:	
City Council,	:	
Defendants.	:	

-----

The parties have filed cross Motions for Summary Judgment in the instant action. Plaintiffs seek a declaration from this Court that the City Council's practice of including, for a number of stated secular purposes, a prayer as part of its opening ceremonies, violates Article I, Section 4 of the Constitution of the State of Utah.

This Court, on January 13, 1992, granted the Motion for Leave to File Amicus Brief on behalf of the American Civil Liberties Union Foundation of Utah, Inc.

Oral arguments on the respective motions were heard February 21, 1991.

#### OPERATIVE FACTS

1. The 1911 Utah State Legislature merged the legislative and executive functions of the city government into a commission form of government. Prayer was not usually offered during these meetings for the years 1911 through 1979.

2. In 1980, pursuant to Title 10-3-1701, et seq., Utah Code Ann., 1953, Salt Lake City adopted the Council-Strong Mayor form of government. This form of government strictly separates the executive and legislative functions. The executive functions are carried out solely by the mayor, with the legislative functions reserved to the City Council.

3. At its first meeting on January 8, 1980, the City Council decided to open the meeting with a ceremony which included the Pledge of Allegiance and a prayer. From January 15, 1980 until October 15, 1987, the proceedings of the City Council reflect that a prayer or invocation was usually offered at the beginning of each weekly legislative meeting.

4. In a letter dated September 23, 1987, Assistant City Attorney Ray Montgomery offered an opinion to the City Council

that pursuant to Marsh v. Chambers, 463 U.S. 783 (1983), opening ceremonies including prayerful invocations were constitutionally permissible.

5. Beginning on May 17, 1988, the City Council reinstituted the practice of including prayers as part of the opening ceremonies of the Council meetings. Prayers were not said before the Salt Lake City Council from October 15, 1987 through May 17, 1988. Defendants acknowledge that the practice of the City Council from 1980 to 1987 was to have prayers and invocations.

6. On October 17, 1991, the Salt Lake City Council adopted the Opening Ceremony Policy by a vote of 5 to 2.

7. The formally adopted City Council Policy provides that as part of an opening ceremony, the City Council will hear various thoughts, readings and invocations prior to beginning certain legislative sessions. Contrary to the formally adopted City Council Policy, at least two of the defendant City Council members acknowledge that prayers and invocations before the City Council have always been offered and will continue to be offered for religious purposes. Yet, the City Council Policy specifies that the offering of these thoughts, readings and invocations is for a number of secular purposes. These

specified secular purposes include the provision of a moment during which the Council members and the audience can reflect on the business before the Council; the promotion of an atmosphere of civility; the encouragement of lofty thought and high-mindedness; the recognition of cultural diversity; and the fostering of sensitivity for and recognition of the uniqueness of all segments of our community.

8. The Council Policy expresses a preference for non-denominational and non-proselyting opening ceremony presentations. Presentation of the opening ceremony is coordinated by the Salt Lake City Police Chaplain. Pursuant to the Policy, anyone not contacted by the Chaplain can make arrangements to give their opening presentation. The presenters are not compensated in any way.

9. Salt Lake City employee, Ed Snow, spent two days in the fall of 1990 making telephone calls to sign up people that would offer prayers at the City Council meetings. He indicated that the City has an extensive mailing list of churches which was used to invite religious leaders to contact the City to offer prayers.

10. Defendant Council member Godfrey acknowledges that the City Council's desire and goal to have non-denominational prayers has not been successful.

11. Defendant Council member Nancy Pace on October 17, 1991 stated with regard to the defendant's recently enacted Policy regarding prayer before City Council meetings, "I don't believe that what we're doing [offering prayers] could be construed as secular and I don't believe that would hold up in court."

12. On September 10, 1991, the Salt Lake City Council allowed the recitation of the following prayer by the Chaplain of the Salt Lake City Police Department:

Our Father in Heaven, we are grateful this night to be able to meet in this forum and we ask Thee to bless those who participate, that their minds will be clear and decisions will be made that will be fair and equitable to the citizens of the City. We are grateful for our government. We are grateful for the land we hold. Father, we are grateful for the safe return of our troops from the Gulf. We ask these blessings in the name of Jesus Christ. Amen.

13. Although requested orally and in writing to cease said practice, the defendants have declined to do so.

14. Defendants admit that "existing city facilities, assets and a small amount of time" are used in conducting the invocations. The inclusion of prayers in City Council meetings results in the expenditure of public funds, assets and

resources of Salt Lake City Corporation. City facilities (meeting rooms, etc.), City equipment (microphones, podiums, stages, etc.), City resources (electricity, printing of programs, etc.), and City employees' time (in supervising, attending, etc.), are used and expended in programming, witnessing and/or reciting said prayers. Said funds, assets and resources of Salt Lake City Corporation are utilized to aid in the recitation of said prayers with the knowledge, approval, concurrence and ratification of the defendants.

#### ANALYSIS

Plaintiffs have sought Summary Judgment against the defendants seeking to enjoin the presentation of prayers and invocations as part of the Salt Lake City Council meetings in that the same constitutes an expenditure and appropriation by defendants of funds and resources in violation of the prohibitory provisions of Article I, Section 4 of the Utah Constitution. Specifically, it is argued the Utah Constitution establishes the right of citizens to have no public money spent on a religious exercise, the right to a government free of sectarian influence or control, and the right to entertain their own religious ideas free of state intrusions. These

guarantees of religious autonomy and absolute separation of church and state explicitly go beyond those protections offered by the United States Constitution. In expanding the rights of its citizens, the Utah Constitution it is argued, distinctly and separately rejects the practice of praying before legislative meetings.

Defendants have responded by arguing that notwithstanding the differences in the language of the Utah Constitution to that of the First Amendment of the United States Constitution, this Court should decide the issue presented the way it has been decided by the United States Supreme Court in the matter of Marsh v. Chambers, 463 U.S. 783 (1983), in that such traditional prayers are, under specified circumstances, acceptable under the First Amendment and do not constitute an establishment of religion. It is argued by the defendants that the offering of non-denominational, non-proselyting prayers for specified secular purposes at "legislative" sessions is acceptable under Article I, Section 4 of the Constitution of Utah. Furthermore, it is argued, the expenditures are de minimus.

Article I, Section 4 of the Utah Constitution in pertinent part declares:



The rights of conscience shall never be infringed. The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;. . . There shall be no union of Church and State, nor shall any church dominate the State, or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. . . .

No prior Utah Supreme Court cases have specifically interpreted the foregoing constitutional provision insofar as it relates to the exercise or the allowance of prayers and/or invocations at city council or legislative meetings. Moreover, none of the cases cited by counsel are specifically on point. However, while not of precedential value, it is instructive to examine decisions from other state courts which have interpreted comparable provisions of their own constitutions. Article I, Section 5, of the Oregon Constitution states:

No money shall be drawn from the treasury for the benefit of any religious [sic] or theological institution, nor shall any money be appropriated for the payment of any religious [sic] services in either house of the Legislative assembly.

This provision was interpreted by the Oregon Court of Appeals in the matter of Kay v. Douglas School District, 719 P.2d 875 (Or.App. 1986). The Oregon court interpreted the prohibition of public expenditure on religious institutions strictly, finding it applicable even though a teacher in a public school had scheduled to read a prayer on volunteered time. The court held, as follows:

The fact that money spent on the preparation and delivery of the invocation was not apportioned and identified as a "line item" in the budget does not take it out of the proscription of Section 5, which prohibits the spending of any money for the benefit of any religious or theological institution. Id. at 878. (Emphasis original)

In the matter of Sands v. Morongo Unified School District, 809 P.2d 809, at 836 (Cal. 1991), three members of the California Supreme Court determined that governmental support and endorsement of graduation prayers violated both the state and federal constitutions.

They refused to find the supposed "sectarian" nature of the prayers acceptable, insisting that a practice is unconstitutional "when it appears to place the government's stamp of approval on a particular type of religious practice,

such as public prayer." Id. at 816. Article XVI, Section 5, of the California Constitution provides:

Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . .

Judge Mosk, concurring, stated that, "[S]tate courts are and should be, the first line of defense for individual liberties...." Id. at 836. Two additional judges of the California Supreme Court having concurred in the finding that the practice involved violated the First Amendment of the United States Constitution, declined to reach the issue of whether or not the practice involved violated the California Constitution. The remaining two judges determined there was no violation.

Clearly, the pertinent provisions in the Utah Constitution in question, have no counterparts in the federal constitution, and are not intended to be restricted by interpretations of the United States Constitution. Instead, as asserted by the Utah Supreme Court, the state constitution embodies certain of the provisions of the federal constitution, and then expands and expounds on these in greater detail:

[P]rovision of Section 4, Article I, of the Utah Constitution. . . is more articulate and express in assuring religious liberty and prohibiting discrimination, or church interference with private or public rights, than the generality of the First Amendment of the U.S. Constitution.  
Manning v. Sevier County, 517 P.2d 549, at 552 (Utah 1973) (Crockett, J., concurring).

One scholar has observed:

Compared to the brief and almost enigmatic statement on religion in the federal constitution, the Utah constitution's provisions seem prolix indeed. Almost every imaginable protection for religious freedom and injunction against the union of church and state has been included.

[T]he union of church and state is expressly prohibited. . . and appropriations of public money or property to "any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment" are proscribed.  
Mazor, Notes on a Bill of Rights in a State Constitution, Utah L.Rev. 326, at 331 (1966).

One of the principal, if not the first canon of statutory or constitutional construction is that if the language of a statute or constitutional provision is clear and unambiguous, examination of legislative intent is unnecessary. In Rampton v. Barlow, 464 P.2d 378 (Utah 1970), the Supreme Court held that if the language of a statute or constitutional provision

was clear, no resort to assumed intent was necessary. "[I]ntent is to be found from the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument." Hines v. Winters, 320 P.2d 1114 (Okla. 1957).

To get at the thought or meaning expressed in a statute...or a Constitution, the first resort, in all cases, is to the natural signification of the words.... If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted and neither the courts nor the Legislature have the right to add to it or take from it.

Shaw v. Grumbie, 278 P. 311 (Okla. 1929)

Where there exists no ambiguity in the language of the document to be interpreted, and the interpretation therefore is not doubtful, there is little reason to resort to factors outside the words themselves for the meaning of the provision.

In this instance, the constitutional provision in question is unambiguous and capable of ready interpretation. The unequivocal, unconditional pronouncements of Article I, Section 4 leave little room for clarification and interpretation.

It is this Court's obligation to make every reasonable presumption in favor of constitutionality, and this Court will not nullify legislative enactments unless it is clear and expressly prohibited by the Constitution. Utah Farm Bureau Ins. Co. v. Utah Insurance Guaranty Assoc., 564 P.2d 751, 753 (Utah 1977). A legislative enactment is presumed to be valid and in conformity with the constitution. For purposes of this decision, the defendants' adopted Policy is treated as "legislative" action, though there is some doubt. It should not be held to be invalid unless it has been shown beyond a reasonable doubt to be incompatible with some particular constitutional provision. Salt Lake City v. Savage, 541 P.2d 1035, 1037 (Utah 1975), cert. den., 425 U.S. 915 (1976).

The language of the Utah Constitution sets forth the absolute law which Utah governmental officials are bound to follow.

By encouraging, supporting, allowing or condoning religious worship before its sessions, the Council is enmeshed in non-secular entanglements. By planning for and presenting public prayers as part of their opening ceremonies, the City Council uses public funds to aid and support the religious practice of prayer.

Government prayer does involve the expenditure of public funds. The City Council has spent time and money to develop guidelines for those offering invocations. The Council members and City employees are paid to observe and be solemnized by the exercise. City employees must schedule and arrange for the attendance of the person offering prayer. Moreover, the facilities intended for use of the City are appropriated for the actual presentation of prayer. Such expenditures contrary to the argument of defendants, are not de minimus, but on the contrary, represent a serious threat to constitutionally protected rights. The Constitution of Utah dictates in clear and bold terms that religious exercise must be separate from the functions of government.

For the foregoing reasons, as well as those set forth in the Memoranda in support of the plaintiff's requested relief, the plaintiff's Summary Judgment is granted as prayed. Defendant's cross Motion for Summary Judgment is denied.

Counsel for plaintiffs is to prepare the appropriate Orders.

Dated this 21<sup>st</sup> day of March, 1992.

  
\_\_\_\_\_  
J. DENNIS FREDERICK  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 2<sup>nd</sup> day of March, 1992:

Brian M. Barnard  
Attorney for Plaintiffs  
214 East 500 South  
Salt Lake City, Utah 84111-3204

Kathryn D. Kendell  
Attorney for ACLU  
419 Boston Building  
Salt Lake City, Utah 84111

M. David Eckersley  
Co-counsel for ACLU  
175 East 400 South, Suite 900  
Salt Lake City, Utah 84111

Bruce R. Baird  
Assistant City Attorney  
Attorney for Defendant  
451 S. State, Suite 505  
Salt Lake City, Utah 84111

C. Beverley



Tab C

# Rush to Amend Utah Constitution Invites Divisive Religious Assault

By Alfred C. Emery  
and John J. Flynn  
FOR THE SALT LAKE TRIBUNE

It is with deep concern that we write about what is likely to become a most divisive time for the people of Utah. There is a headlong rush to amend the Utah Constitution to enable local governments to introduce their meetings with prayer. In order to accomplish this objective, amendment proponents are seeking the removal of language unique to Utah's Constitution to make it conform with the language of the United States Constitution.

It should be noted that there is no guarantee that local government prayers are constitutional under the federal Constitution, because that issue has not been directly decided by the United States Supreme Court.

In any event, the language which would need to be removed from the Utah Constitution to conform it with the federal includes the clauses which provide: 1. "The rights of conscience shall never be infringed"; 2. "There shall be no union of church and state"; 3. "Nor shall any church dominate the state or interfere with its functions" and, 4. "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."

The reason this extensive list of prohibitions was placed in the Utah Constitution was the fear that a state overwhelmingly made up of citizens of one faith and a state with the unique history of being established by the members of one faith fleeing unjust persecution elsewhere would become a theocracy — a state where the Church of Jesus Christ of Latter-day Saints and the state government would become one in fact because of the overwhelming number of citizens being members of the LDS faith.

The central fear was that members of minority religions and those with no religious beliefs would be excluded from effective participation in the governing of the state and that the rights of the minority would be ignored by the LDS majority and the state government that majority dominated. Church policy, it was believed, would control state government indirectly, if not directly, by virtue of church members holding most of the elective and appointive offices of government and that those members would naturally vote or exercise their religious views without the need for express church direction.

Those fears remain today and are reinforced when an issue like eliminating the express prohibitions upon religious involvement with government from the Utah Constitution is proposed. These fears are not unjustified paranoia for non-Mormons confronted by domination of most of the elective and appointive public institutions around them by members of the

ments, school boards and schools to all three branches of the state government, and the elective offices to the national government. Non-Mormon fears of church domination and use of state power become reinforced by obvious denominational influence on public issues like liquor control, parimutuel betting, regulations of wineries, abortion regulation and the writing and rewriting of sexual education manuals for public schools.

If the Legislature places an amendment on the November ballot to remove the constitutional barriers to undue church or denominational influence upon and domination of state government, it may well be on the ballot with a proposal to overturn a church-influenced vote in the Legislature refusing to sanction parimutuel betting on horse races. Paradoxically, voters may be asked to approve a law defeated by church influence on the Legislature and — at the same time — be asked to amend the State Constitution's prohibitions upon undue church influence upon state government on the same ballot.

Whatever the merit of these individual actions is beside the larger point we wish to make. All the elements are present for a bitter and divisive split along religious lines by a vote to repeal important limitations protecting minority rights in the Utah Constitution. Eliminating those guarantees will not only present the spectacle of overturning individual rights by majority vote, but will also reinforce the belief by many who do not belong to the dominant religion in this state that they are not welcome and have no say in government or public affairs in this state. The longstanding and unfortunate division between Mormon and non-Mormon will only be accentuated and possibly be made irrevocable.

Aside from the obvious risks for future economic development, tourism and efforts to attract outside businesses to Utah, such a state of affairs will do great long-term injury to one and all — both Mormon citizens and non-Mormon citizens of this state who have much to learn from one another. We should be looking for ways to bring the people of this state together, not driving them further apart by premature votes on amending the state's Constitution.

The emotional rush to amend the Utah Constitution should be brought to a halt, so cooler minds may prevail and an assessment of the long-term harm to this state and the ability of all its peoples to live peacefully and respectfully together can be made. We should await a final decision by the Utah Supreme Court on the issue of prayers by local governments before taking any action drastically amending the Utah Constitution.

In the interim, local governments should consider an alterna-

interests of people of all religious persuasions and those with none. A moment of silence for personal reflection in all public meetings and in the Legislature can satisfy the needs of those who need to pray for divine guidance, and each can do it in their own way. A moment of silence might also cause those who see no need for divine guidance to reflect upon why they so believe or to think more deeply about the issues they are about to discuss.

In this way, time to reflect about amending the Constitution may be gained so that we may all consider more seriously the obligations of the majority to the minority in matters of conscience; the role of lawmakers to reflect more seriously upon the obligation of their role to serve the best interests of all citizens and not just those who share their personal moral and religious beliefs; and the wisdom of the parable of the Pharisees and the Publicans with respect to the use of power to force others to listen to one's prayers may be more fully appreciated.

Those who object to the moment of silence in favor of public prayers at governmental meetings should ponder why it is that they insist upon the use of governmental power to force all those participating in a public meeting to listen to the prayers being offered in lieu of each person offering their own prayer silently. If that reason is that a majority should have the right to force a minority to conform to the majority's will or recognize its power in this most sensitive area of individual conscience, then we are confronting a fundamental attack upon the very idea of a Bill of Rights. The purpose of constitutional guarantees of individual rights is to remove certain rights from popular vote and to guarantee those rights of each individual against the majority's will and power.

If there is one group in America who should appreciate this most fundamental purpose of constitutional guarantees of individual liberties, it is the heirs of the Mormon pioneers, whose basic rights to freedom of religion and conscience were grossly violated by the majority in Illinois and Missouri. The basic denial of their individual rights drove the pioneers on their long and dangerous journey to settle in Utah.

If the Utah Constitution is amended to ensure that the majority's will overrides the rights of a minority in matters of conscience and the right to be free from the use of governmental power to be forced to conform to majority religious beliefs, the paradox will be one of the great paradoxes of the American experience and generate an unfortunate, painful and divisive debate we do not need in Utah.

Alfred C. Emery and John J. Flynn are University of Utah professors of law.